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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 09-3334

Nancy J. Wetherill,
Plaintiff-Appellant,

v.

Pete R. Geren, Secretary of the Army; The Army National Guard; Steven R. Doohen, Brigadier General, in his official capacity as Adjutant General of the South Dakota National Guard; Theodore Johnson, Brigadier General, in his official capacity; and The South Dakota Army National Guard,
Defendants-Appellees.

Appeal from the United States District Court for the District of South Dakota.

Submitted: June 17, 2010
Filed: August 11, 2010

Before WOLLMAN, EBEL[1] and COLLOTON,

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[1] The Honorable David M. Ebel, United States Circuit

Circuit Judges.

EBEL, Circuit Judge.

This case requires us to determine whether the Feres doctrine, which generally bars judicial review of military decision-making, precludes us from hearing a Title VII suit brought by a "dual-status" National Guard technician, whose position was both military and civilian in nature. While Colonel Nancy Wetherill was initially granted a waiver of mandatory retirement from her military position, that waiver was later revoked. As a result, she was forced to quit her civilian position as a dual-status technician, and she was unable to obtain the full Civil Service pension attendant to the civilian aspect of that position. Wetherill brought suit under Title VII, alleging that the revocation of her military waiver constituted impermissible discrimination based on sex and/or national origin. The district court [2] dismissed the action, holding that Wetherill's complaint was non-justiciable under the Feres doctrine.

On appeal, Wetherill presses two arguments. First, she argues that the Feres doctrine does not apply at all to dual-status National Guard technicians, by operation of a 1997 amendment to 10 U.S.C. § 10216 addressing funding for such positions. Second, she argues that, even if Feres applies to dual-status technicians generally, the district court applied the improper standard to her case and thus prematurely dismissed her action. Exercising jurisdiction under 28

Judge for the Tenth Circuit, sitting by designation.

[2] The Honorable Karen E. Schreier, Chief Judge for the District of South Dakota, presiding.

U.S.C. § 1291, we AFFIRM the decision of the district court.

BACKGROUND

Nancy Wetherill is a Japanese-American woman.[3] She began working for the South Dakota Army National Guard in 1974, was commissioned as an officer on July 4, 1977, and was promoted to her highest rank of Colonel on July 1, 1999. As for the events giving rise to this litigation, Wetherill was employed as a "dual-status" National Guard technician, which meant that she was paid as a civilian employee under the Civil Service system, but her job required her at all times to be an officer of the National Guard, and she worked in uniform. See 10 U.S.C. § 10216(a); 32 U.S.C. § 709(b).

Under 10 U.S.C. § 14507(b), National Guard Colonels who have not been recommended for promotion to a higher rank are required to retire from the military after 30 years of service. This statute thus sets an officer's Mandatory Retirement Date ("MRD"). Wetherill's MRD was July 31, 2007. Under the regulations of the Civil Service Retirement System, however, Wetherill would not qualify for a full retirement annuity unless she continued working in her civilian capacity as a dual-status National Guard technician until December 31, 2010, which she could not do once she was retired from the military.

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[3] On review of the district court's grant of a motion to dismiss, we take all factual allegations in the complaint as true. Little Gem Life Sciences, LLC v. Orphan Medical, Inc., 537 F.3d 913, 917 (8th Cir. 2008).

Faced with this predicament, Wetherill asked Major General Michael A. Gorman, then the Adjutant-General[4] of the South Dakota Army National Guard, for a waiver of her MRD so that she could continue working until her Civil Service annuity matured. General Gorman granted this request on May 10, 2007, and his decision was approved by the National Guard on July 18 of that year. In September 2007, however, General Gorman retired, and Brigadier General Steven R. Doohen was appointed Adjutant-General of the South Dakota National Guard. In January 2008, General Doohen asked the National Guard to revoke the waiver given to Wetherill; in February, he informed Wetherill of this decision and that it was being made for "force management" reasons. (Apl't App. at 5 [Complaint ¶ 15].) The National Guard approved General Doohen's request, and Wetherill's MRD was re-set to July 31, 2008 (at this point, she was already serving beyond her original statutory MRD pursuant to the May 2007 waiver).

Wetherill believed that General Doohen's revocation of her MRD waiver was motivated by sex and/or national origin discrimination, and complained both informally and formally to the Office of Equal Opportunity and Civil Rights of the National Guard Bureau. Between May and July 2008, Wetherill was reassigned to a building where she worked in a room by herself, and was given work "that no Colonel would ever be required to perform." (Apl't. App. at 5-6 [Complaint ¶ 19].) According to Wetherill's complaint,

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[4] The Adjutant-General of a state's National Guard is the overall commander of that state's Guard. See 32 U.S.C. § 314.

no other technician in the South Dakota Army National Guard has had an MRD waiver revoked, and she is the only Asian-American female officer and the only woman to have served at her level in the South Dakota Army National Guard. Wetherill did indeed retire from the Guard on July 31, 2008, and thus had to relinquish her technician job as well. See 32 U.S.C. § 709(b) (requiring that dual-status technicians must "[b]e a member of the National Guard").

After her appeal was denied by the National Guard Bureau, Wetherill filed this action in the District of South Dakota against the Secretary of the Army, the Army National Guard, General Doohen and another general, and the South Dakota Army National Guard (collectively, "the Guard"), alleging discrimination and retaliation based on sex and/or national origin, in violation of Title VII. 42 U.S.C. § 2000e-2(a)(1) (barring discrimination "against any individual . . . because of such individual's race, color, religion, sex, or national origin . . . ."). All of the defendants moved to dismiss the complaint under a variety of theories. The district court granted the motions to dismiss, holding that Wetherill's complaint was nonjusticiable under the Feres doctrine, and thus that the court lacked subject-matter jurisdiction to hear the case. Wetherill v. Geren, 644 F. Supp. 2d 1135, 1142 (D.S.D. 2009). Wetherill timely appealed to this court. We review the district court's grant of a motion to dismiss for lack of subject-matter jurisdiction de novo. Ark. Blue Cross & Blue Shield v. Little Rock Cardiology Clinic, P.A., 551 F.3d 812, 816 (8th Cir. 2009).

DISCUSSION

I. Genesis and Development of the Feres Doctrine

In order to understand the gravamen of Wetherill's arguments on appeal, a brief detour is in order to assess the origins and history of the Feres doctrine. In Feres v. United States, 340 U.S. 135 (1950), the Supreme Court held that members of the armed forces who sustained injury while on duty due to the negligence of other servicemembers or the military itself could not sue the United States under the Federal Tort Claims Act ("FTCA"). The Court framed its decision in terms of statutory interpretation. While there was no language in the FTCA expressly excluding servicemember claims against the military—and indeed, some of the statutory language could have been construed as implicitly endorsing such liability[5]—the Court nevertheless interpreted the statute in concert with "the entire statutory system of remedies against the Government." Id. at 139. In the

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[5] For example, the FTCA expressly included within "employee[s] of the Government" whose actions could give rise to liability "members of the military or naval forces of the United States." See Feres, 340 U.S. at 138 (quoting 28 U.S.C. § 2671). And the FTCA explicitly excluded injuries suffered by soldiers "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during times of war." Id. (quoting 28 U.S.C. § 2680(j)) (emphasis omitted). Thus the language of the statute could have been construed to reach injuries incurred not during time of war and not arising out of combatant activities (such as the accidental injuries sustained by the parties in Feres). See id.

Court's view, the FTCA was a narrow exception to the otherwise prevailing norm of sovereign immunity. Congress enacted the statute in order to "transfer[] the burden of examining tort claims to the courts," and thus stem the "steadily increas[ing]" tide of private bills in Congress demanding relief for individuals who had suffered harm at the hands of the government. Id. at 140. But, the Court noted, "Congress was suffering from no plague of private bills on the behalf of military and naval personnel, because a comprehensive system of relief had been authorized for them and their dependents by statute." Id. Thus, in the Court's view, compensation for harms suffered by servicemembers while on duty was not within Congress' purpose in passing the FTCA.

The Court then turned to the language of the FTCA providing the test for liability: "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." Id. at 141 (quoting 28 U.S.C. § 2674). This test did not create a new species of liability; it merely adopted the standards of tort law as applied to private individuals. And because "[w]e know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving," the petitioners in the case could point to no analogous circumstance that a private individual might face that would give rise to liability; private individuals, after all, cannot maintain armies. Id. Thus, the FTCA could not create liability in the United States for a harm which no private party could inflict under tort law.

In reaching its conclusion, the Court

distinguished one of its earlier precedents, Brooks v. United States, 337 U.S. 49 (1949), in a manner that sheds light on the governing standard under Feres. In Brooks, a soldier who was injured when a government-owned and -operated vehicle collided with a car in which he was a passenger, was allowed to recover from the United States under the FTCA. Feres, 340 U.S. at 146. Brooks could do so, however, only because he had been on furlough at the time of the accident: "[t]he injury to Brooks did not arise out of or in the course of military duty." Id. at 146. In contrast, Feres was killed when his barracks caught on fire while he was on active duty. Id. at 137. According to the Court, the federal government cannot be liable under the FTCA "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Id. at 146 (emphasis added).

In a later case, Chappell v. Wallace, 462 U.S. 296 (1983), the Supreme Court further articulated the policy basis of Feres and its progeny. Underlying Feres was a recognition of "the peculiar and special relationship of the soldier to his superiors, [and] the effects on the maintenance of [FTCA] suits on discipline." Id. at 299 (quoting United States v. Muniz, 374 U.S. 150, 162 (1963) (internal quotation marks omitted)). The Court counseled that "[c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment." Id. at 300. Thus the Court in Chappell extended the reasoning of Feres to bar suits by soldiers against their superiors

for violation of constitutional rights under Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (creating a cause of action for injuries sustained due to unconstitutional actions of federal agents). Chappell, 462 U.S. at 305.

The courts of appeals have extended Feres to encompass Title VII claims by servicemembers against the military. While the text of Title VII makes its strictures applicable to "employees . . . in military departments," 42 U.S.C. § 2000e-16(a), that provision has generally been interpreted to apply only to civilian employees of the armed forces. Johnson v. Alexander, 572 F.2d 1219, 1224 (8th Cir. 1978) ("[N]either Title VII nor its standards are applicable to persons who enlist or apply for enlistment in any of the armed forces of the United States."); see also 29 C.F.R. § 1614.103(d)(1) (EEOC regulation noting that Title VII applies to "military departments," but not to "[u]niformed members of the military departments"). Thus, as a general rule, the Feres doctrine precludes claims brought by servicemembers under Title VII arising out of activities that are incident to military service. See Hupp v. U.S. Dep't of the Army, 144 F.3d 1144, 1147 (8th Cir. 1998); see also, Overton v. N.Y. State Div. of Military and Naval Affairs, 373 F.3d 83, 89 (2d Cir. 2004); Brown v. United States, 227 F.3d 295, 299 (5th Cir. 2000); Mier v. Owens, 57 F.3d 747, 749-50 (9th Cir. 1995). The Feres doctrine also generally applies to members of the National Guard, as well as members of the regular military. Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 667 n.1, 672, 673-74 (1977) (applying Feres to block a third-party indemnity claim against the United States over the death of a National Guard officer); see also

Hupp, 144 F.3d at 1147.

II. The Feres Doctrine Applies to Dual-Status National Guard Technicians

Notwithstanding the unquestioned applicability of the Feres doctrine to servicemembers generally, Wetherill argues that we should not apply the doctrine to her position—dual-status National Guard technician—specifically. This argument springs from the text of 10 U.S.C. § 10216, which provides:

> (a) In general. — (1) For purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee who—
>
> (A) is employed under section 3101 of title 5 or section 709(b) of title 32[6];
>
> (B) is required as a condition of that employment to maintain membership in the Selected Reserve; and
>
> (C) is assigned to a civilian position as a technician in the organizing, administering, instructing, or training of the Selected Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.

This provision was enacted as part of the National Defense Authorization Act for Fiscal Year 1998, Pub. L. 105-85, 111 Stat. 1629, 1734-35 (1997).[7] The

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[6] 32 U.S.C. § 709(b) is the applicable provision governing Wetherill's dual-status civilian employment.

[7] 10 U.S.C. § 10216 was first enacted as part of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106,

essence of Wetherill's argument is that § 10216 establishes that dual-status technicians are "Federal civilian employee[s]" "[f]or purposes of . . . any other provision of law," which, she argues, would include Title VII (emphasis added). In her view, then, § 10216 renders her position civilian, rather than military, and thus the Guard should be amenable to her Title VII suit notwithstanding the Feres doctrine.[8]

In support of this argument, Wetherill points to Jentoft v. United States, 450 F.3d 1342 (Fed. Cir. 2006). In that case, the Federal Circuit considered the

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110 Stat. 186, 306 (1996). Subsection (a), which is the provision at issue in this case, was added as part of the 1997 amendments referenced above.

[8] As a preliminary matter, we note that Hupp, in which we applied the Feres doctrine to bar a Title VII claim brought by a dual-status National Guard technician, was decided approximately six months after the enactment of the current version of § 10216. We did not consider the effect of the newly-amended statute in Hupp, and, indeed, in that case, the plaintiff "acknowledge[d] that employment decisions concerning a National Guard civilian technician's military qualifications are non-justiciable under the Feres doctrine." Hupp, 144 F.3d at 1147.

As a general proposition, "when an issue is not squarely addressed in prior case law, we are not bound by precedent through stare decisis." Passmore v. Astrue, 533 F.3d 658, 660 (8th Cir. 2008) (citing Brecht v. Abrahamson, 507 U.S. 619, 630-31 (1993)); see also Webster v. Fall, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."). Given that we are here reaffirming the applicability of the Feres doctrine to dual-status National Guard technicians, we need not address the finer points of the stare decisis force of the parties' concession to that effect in Hupp.

interaction of § 10216 and the Feres doctrine in the context of an Equal Pay Act claim, and came out on Wetherill's side of the question. For the Federal Circuit, the plain language of the statute—that a dual-status technician is "a Federal civilian employee" for the purposes of "any other provision of law"—was sufficient to indicate Congress' purpose to remove dual-status technicians from the ambit of judge-made doctrines such as Feres. Jentoft, 450 F.3d at 1348 ("[T]here is no language in § 10216(a) limiting the circumstances in which a dual status technician can be considered a federal civilian employee."). Given "the broad and unambiguous language contained in" the statute, the Federal Circuit believed that application of Feres to dual-status technicians was effectively foreclosed by the actions of Congress. Id. at 1349 (noting that Congress has the ultimate authority to regulate the military system of justice).

However, two of our sister circuits have considered and rejected the reasoning of Jentoft. In Walch v. Adjutant General's Dep't. of Texas, 533 F.3d 289 (5th Cir. 2008), the Fifth Circuit reaffirmed its precedent that the Feres doctrine applies to dual-status National Guard technicians, notwithstanding the 1997 amendments to 10 U.S.C. § 10216. That court began by noting that the operative language of § 10216 "refer[s] to technicians' civilian status as an introduction to provisions primarily concerned with the annual requests to Congress for authorizing specific numbers of technician positions." Walch, 533 F.3d at 299. This statutory language classifying dual-status technicians was, in the Fifth Circuit's view, "nothing new." Id. Indeed, the court observed that the 1997 amendments to § 10216 had not made dual-

status technicians federal civilian employees; rather, "[t]he 1968 National Guard Technician Act [which created the position of dual-status technician in the first place] did that." Id. at 300. In sum, the Fifth Circuit did not believe that Congress had intended "a doctrinal revolution" in amending § 10216 in 1997, and thus held that Feres continued to apply. Id.

The Ninth Circuit picked up and expanded upon this line of reasoning, while rejecting the conclusion of the Jentoft court, in Zuress v. Donley, 606 F.3d 1249 (9th Cir. 2010).[9] The Zuress court examined the legislative history of the 1997 amendments to § 10216 and discovered that "the provisions at issue appear to have been primarily concerned with distinguishing between dual status and non-dual status technicians and with annual requests to Congress for authorization of different categories of technicians." 606 F.3d at 1255. The "any other provision of law" language relied upon by Wetherill and the Jentoft court, in the Ninth Circuit's view, was added to the statute in 1997 merely to "eliminate inconsistencies in the nomenclature used to refer to dual status technicians, rather than to override settled case law on intra-military immunity," such as the Feres doctrine. Id. (citing H.R. Rep. No. 105-132, at 358 (1997) ("The National Defense Appropriations Act for Fiscal Year 1996 . . . and the National Defense Authorization Act for Fiscal Year 1996 . . . enacted provisions defining the term 'military technician' which were not completely consistent with

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[9] The plaintiff in Zuress was a dual-status Air Reserve technician, rather than a dual-status National Guard technician, but the statutory provisions at issue are the same. 606 F.3d at 1250.

one another. This section would remove the inconsistencies . . . ."). In light of this explanation for the "any other provision of law" language and the lack of any mention of Title VII or the Feres doctrine in the legislative history, the Zuress court concluded that Congress did not intend for the 1997 amendments to affect the application of that doctrine to dual-status technicians. Id.

We are more persuaded by Walch and Zuress than by Jentoft, and thus join the Fifth and Ninth Circuits in holding that the 1997 amendments to 10 U.S.C. § 10216 do not remove dual-status National Guard technicians from the strictures of the Feres doctrine. Like the Fifth Circuit, we had acknowledged the hybrid military-civilian nature of dual-status technicians prior to the 1997 amendments to § 10216. See Wood v. United States, 968 F.2d 738, 739 (8th Cir. 1992). Our recognition of the civilian aspect of the dual-status technician positions has given us no pause in applying the Feres doctrine to the military aspects of that position. See id. at 740; see also Hupp, 144 F.3d at 1147; Uhl v. Swanstrom, 79 F.3d 751, 756 (8th Cir. 1996). Thus, as the Fifth Circuit noted, the recognition in the 1997 amendments that dual-status technicians are federal civilian employees—albeit civilian employees which had as a condition of their employment that they remain members of the armed services—was indeed "nothing new." Moreover, the Ninth Circuit's analysis in Zuress provides a convincing justification for the reference in the 1997 amendments to "any other provision of law"; this language was designed to harmonize the nomenclature to be used for dual-status technicians throughout the U.S. Code. See Zuress, 606 F.3d at

1255.

Indeed, it would have been odd for Congress fundamentally to alter the legal condition of dual-status technicians in 10 U.S.C. § 10216, a statute that overwhelmingly just addresses the details of obtaining funding for National Guard positions, see, e.g., 10 U.S.C. §§ 10216(b) ("As a basis for making the annual request to Congress . . . ."); (c) ("The Secretary of Defense shall include as part of the budget justification documents . . . ."); (e) ("Funds appropriated for the Department of Defense . . . ."), rather than in 32 U.S.C. § 709, which defines the position of dual-status technician and lays out who may and may not occupy such a position. In the words of the Fifth Circuit in Walch, such an action would have created a "doctrinal revolution," which has gone unnoticed by every court other than the Federal Circuit in Jentoft. Walch, 533 F.3d at 300. And, as the Supreme Court has observed, Congress "does not, one might say, hide elephants in mouseholes." Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001). This particular elephant—opening the National Guard to lawsuits by any dual-status technician under any federal statute—is simply too big for the mousehole that is 10 U.S.C. § 10216.

In sum, then, we reject the reasoning of the Federal Circuit in Jentoft, join the Fifth and Ninth Circuits, and reaffirm our own circuit precedent that the Feres doctrine may be applied to dual-status National Guard technicians, notwithstanding the 1997 amendments to 10 U.S.C. § 10216.

III. The District Court Correctly Dismissed Wetherill's Claim Under the Feres Doctrine

With the question of the applicability of the Feres doctrine to dual-status National Guard technicians settled in the affirmative, we now turn to whether the district court correctly dismissed Wetherill's Title VII claims for lack of subject-matter jurisdiction. En route to dismissing Wetherill's claims, the district court considered a number of different standards used by different circuits for dismissal of a case under the Feres doctrine. Wetherill, 644 F. Supp. 2d at 1140-41 (noting standards such as "involves an assessment of military qualifications," "integrally related to the military's unique structure," and "irreducibly military in nature"). In the end, however, the district court concluded that "[u]nder any of these analyses used by various courts of appeal, Wetherill's Title VII claims are barred." Id. at 1141.

Here, Wetherill argues, the district court erred. In her view, the district court should have exclusively considered the Feres standard laid out by this court in Hupp, which is to say that the disposition of her claim should have turned on whether the challenged decision "involved an assessment of a technician's military qualifications." Hupp, 144 F.3d at 1148. Moreover, Wetherill argues that the district court answered that question prematurely; noting that the Hupp court relied upon a sworn statement produced during discovery in making its decision, Wetherill argues that the district court should have denied the motion to dismiss, allowed discovery to proceed, and adjudicated the Feres issue on a motion for summary

judgment.

We disagree on both counts. First, despite Wetherill's arguments to the contrary, the Hupp court did not purport to set out the "involves an assessment of military qualifications" test as a standard to be applied to all Feres doctrine challenges. Hupp cited three prior cases—Uhl, Wood, and Watson—for its "assessment of military qualifications" language. Hupp, 144 F.3d at 1148. That language, however, did not appear in Watson, originated in Wood, and was quoted only parenthetically in Uhl. Wood, 968 F.2d at 740 ("The nature of the pleaded claim, judicial review of a discrete intraservice personnel decision which decision involves, as it does, an assessment of an individual's military qualifications for command responsibilities . . . is nonjusticiable . . . ."); see also Uhl, 79 F.3d at 755 (citing Wood); Watson v. Ark. Nat'l Guard, 886 F.2d 1004, 1010 (8th Cir. 1989) (observing that claims requiring "a fact-specific inquiry into an area affecting military order and discipline" implicate the Feres doctrine).

This is not to criticize either the Hupp court or the district court here in using the "involves an assessment of military qualifications" language. Rather, it merely goes to show that that language was not meant by any prior panel of this court to be a one-size-fits-all test for all Feres claims. Under the facts of Hupp and Wood, the court there looked to whether the challenged decisions involved an assessment of military qualifications because, in both cases, the technicians challenged the Guard's decision not to promote them to a particular position. Hupp, 144 F.3d at 1145 (challenging decision not to promote Hupp

from Detachment Sergeant to Support Services Supervisor); Wood, 968 F.2d at 739 (challenging failure to assign Wood to position of Air Commander). In such a case, inquiring into what informed the decision not to promote would be essential to deciding whether Feres was implicated. It does not follow, however, that every Feres case will turn on whether the challenged decision involved an assessment of military qualifications.

In any event, we are not persuaded that these various standards of Feres are inconsistent, or reflect anything more than the unique facts and claims presented by the parties in those particular cases. At its core, the standard to be applied by this court to determine whether a particular claim is barred under the Feres doctrine is, quite simply, the standard articulated in Feres itself: Did the injury complained of arise out of or occur in the course of activity incident to military service? Feres, 340 U.S. at 146. To ask whether a decision involved an assessment of military qualifications, Hupp, 144 F.3d at 1148, or whether the conduct was "integrally related to the military's unique structure," Luckett v. Bure, 290 F.3d 493, 499 (2d Cir. 2002), or whether the position at issue is "irreducibly military in nature," Fisher v. Peters, 249 F.3d 433, 441 (6th Cir. 2001), is only to ask, as applied to a particular set of facts or a particular legal claim, whether the injury was incident to military service. The Hupp and Wood courts did not intend their language to be regarded as magic words for all Feres cases; rather, those words were merely the most efficient tool for excavating the underlying question of whether the injury was incident to military service.

Of course, since the operative test is whether the injury arose out of activity incident to military service, it is conceivable that a dual-status technician might suffer an injury purely as a civilian that could give rise to a justiciable claim against the Guard as employer. Such a case would be a descendant of Brooks, where the Supreme Court held that a soldier's accidental death due to military negligence while off duty gave rise to a justiciable FTCA claim against the United States. Brooks, 337 U.S. at 50, 54 (cited in Feres, 340 U.S. at 146). While at least one of our sister circuits apparently has held that dual-status technicians are "irreducibly military in nature" such that they can never have a claim against the Guard, Fisher, 249 F.3d at 441, 443, we decline to adopt such a categorical rule. Accord Overton v. N.Y. State Div. of Military and Naval Affairs, 373 F.3d 83, 95 (2d Cir. 2004) (abjuring a categorical rule for all dual-status technicians); Brown v. United States, 227 F.3d 295, 299 (5th Cir. 2000) (same); Mier v. Owens, 57 F.3d 747, 750 (9th Cir. 1995) (same). Because Title VII applies to civilian employees of military departments, dual-status technicians could theoretically suffer an employment injury not incident to military service, and thus maintain a justiciable suit under Title VII against the Guard.

This is not such a case, however.

With the legal landscape now explored, we finally turn to whether the district court correctly dismissed Wetherill's Title VII claims without further discovery. In Wetherill's complaint, which we must take as true for the purpose of reviewing a dismissal, she stated that her Guard superiors told her they were

revoking her MRD waiver for "force management reasons." (Apl't App. at 5 [Complaint ¶ 15].) To be sure, she claimed that the proffered reason was mere pretext for discrimination, (Id. at 6 [Complaint ¶ 23] ("The reasons given for the revocation of Plaintiff's MRD were pretextual in nature.")), but that does not change the fact that Wetherill herself informed the district court in her complaint that the Guard claimed a military motive for its actions. Moreover, in identifying her injury more specifically, Wetherill complained that she was given work "that no Colonel would ever be required to perform." (Id. at 6 [Complaint ¶ 19].) This may have been humiliating to her, to be sure, but her very claim identifies as the source of that humiliation her military rank of Colonel. Wetherill's own factual allegations in her complaint situate this case in the heartland of the Feres doctrine.

Even if she had not identified these military bases for her injury, however, the very premise of Wetherill's lawsuit belies any claim that her injuries were not incident to military service. The essential core of Wetherill's complaint is that the Guard discriminatorily revoked her MRD waiver, which required her to retire from the Guard, which then caused her to lose her civilian position. See 32 U.S.C. § 709(b)(2) (requiring dual-status technicians to "[b]e a member of the National Guard"). But the MRD waiver and its revocation related exclusively to her military position—the effect on her civilian position was purely secondary and incidental, and occurred only due to the operation of § 709. Thus Wetherill's is precisely the opposite of a case where a dual-status technician might have a claim against the Guard under Title VII. The action she complained of was purely military,

rather than purely civilian, in nature, even though that military action happened to have some civilian consequences.

Thus, the district court did not err in dismissing Wetherill's claim under the Feres doctrine without further discovery, because the allegations laid out in Wetherill's complaint made the applicability of Feres to her claims an open-and-shut case.

CONCLUSION

We conclude that the Feres doctrine applies to dual-status National Guard technicians notwithstanding the 1997 amendments to 10 U.S.C. § 10216. Further, we reassert that the standard for determining whether Feres renders a suit nonjusticiable is whether the injuries complained of arise out of or occur in the course of activity incident to military service; under that standard, the district court did not err in dismissing Wetherill's claims.

The judgment of the district court is therefore AFFIRMED.

United States Court of Appeals
For The Eighth Circuit
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RE: 09-3334 Nancy Wetherill v. Pete Geren, etc., et al

Dear Sirs:

A published opinion was filed today in the above case.

Counsel who presented argument on behalf of the appellant was Sarah E. Baron Houy, of Rapid City, SD.

Counsel who presented argument on behalf of Appellees Doohen, Johnson, and The SD Army National Guard was Robert Bruce Anderson, of Pierre,

SD. Counsel who presented arfument on behalf of Appellees Geren and The Army National Guard was Daneta Wollmann, AUSA. of Rapid City, SD.

The judge who heard the case in the district court was Honorable Karen E. Schreier. The judgment of the district court was entered on July 31, 2009.

If you have any questions concerning this case, please call this office.

Michael E. Gans
Clerk of Court

MER

Enclosure(s)

cc: Lois Law
MO Lawyers Weekly

District Court/Agency Case Number(s):
5:08-cv-05077-KES

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

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Clerk of Court

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August 11, 2010

Ms. Sarah E. Baron Houy
BANGS & MCCULLEN
333 West Boulevard
P.O. Box 2670
Rapid City, SD 57701-0000

RE: 09-3334 Nancy Wetherill v. Pete Geren, etc., et al

Dear Counsel:

The court today issued an opinion in this case. Judgment in accordance with the opinion was also entered today.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be

received in the clerk's office within 45 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. No grace period for mailing is allowed, and the date of the postmark is irrelevant, for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en banc which is not received within the 45 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans
Clerk of Court

MER

Enclosure(s)

cc: Mr. Robert Bruce Anderson
Mr. Joseph A. Haas
Mr. Michael Martin Hickey
Ms. Daneta Wollmann

District Court/Agency Case Number(s): 5:08-cv-05077-KES

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Civ. 08-5077-KES

NANCY J. WETHERILL
Plaintiff,

vs.

PETE R. GEREN, Secretary of the Army; THE ARMY NATIONAL GUARD; STEVEN R. DOOHEN, Brigadier General, in his official capacity as Adjutant General of the South Dakota National Guard; THEODORE JOHNSON, Brigadier General, in his official capacity; and THE SOUTH DAKOTA NATIONAL GUARD,
Defendants.

Order Granting Motions to Dismiss

Plaintiff, Nancy Wetherill, brought this action alleging discrimination based on her gender and on race and national origin. Defendants Steven Doohen, Theodore Johnson, and the South Dakota National Guard move to dismiss. Defendants Pete Geren and

the Army National Guard move to dismiss. For the reasons stated below, both motions are granted.

FACTUAL BACKGROUND

Wetherill joined the Army National Guard in 1974 and was commissioned on July 4, 1977. From 1982 to 2008, Wetherill served in Rapid City, South Dakota, as a full-time military technician. On July 1, 1999, she achieved the rank of colonel, and on April 1, 2007, Wetherill became the Director of Operations, Military Technician, for the South Dakota Army National Guard.

Under 10 U.S.C. § 14507(b), a colonel is removed from active status the first day of the month after the month in which the officer completes 30 years of commissioned service. According to this statute, Wetherill's Mandatory Removal Date (MRD) was July 31, 2007. In May 2007, Major General Michael A. Gorman, who was at the time Adjutant General of the South Dakota Army National Guard, submitted a request to the National Guard Bureau (NGB) that Wetherill's MRD be extended to December 30, 2010. That is the date on which Wetherill could have received full annuity payments under the Civil Service Retirement System; an earlier MRD would mean that she would collect a reduced annuity payment. On July 18, 2007, NGB approved this request. Shortly thereafter, Major General Gorman retired as Adjutant General and was replaced by Brigadier General Steven Doohen.

On January 23, 2008, Adjutant General Doohen asked the NGB to revoke the MRD extension

previously granted to Wetherill and to recognize April 30, 2008, as her new MRD. On February 2, 2008, Brigadier General Theodore Johnson and Colonel Dennis Flanery informed Wetherill that on April 30, 2008, she would be terminated from her military technician position for "force management" reasons. Then, Adjutant General Doohen stayed Wetherill's MRD from April 30, 2008, to July 31, 2008. On February 5, 2008, the NGB granted Adjutant General Doohen's request to revoke Wetherill's previous MRD and held that the "effective date of separation is 31 July 2008." Docket 1 ¶ 17. Wetherill protested the modification of her MRD and made allegations of gender and racial discrimination, all to no avail. On May 8, 2008, Wetherill was given a new work assignment, which she claims involved work that was "intended to be performed by persons holding a rank lower than Colonel." This new assignment also forced her to work by herself in an isolated building. Ultimately, Wetherill was terminated from her military technician position on July 31, 2008.

Wetherill states that she was the only female Asian-American officer in the South Dakota Army National Guard and was the only female in the South Dakota Army National Guard "to have served at the 06 level in a non-special branch." Id. ¶ 22. Finally, Wetherill claims that "[n]o other technician in the South Dakota Army National Guard has ever been denied the opportunity to receive an unreduced annuity as a result of having an MRD waiver being denied, modified or revoked." Id. ¶ 20.

Wetherill's complaint states that the decision to revoke her MRD waiver was due to discrimination

based on her gender, race, and national origin, and that the act of moving Wetherill to a different work station in May 2008 was in retaliation for her complaints of discrimination. Because of defendants' discrimination, Wetherill alleges that she was deprived of receiving a full retirement annuity, future promotions, and substantial pay increases, and she suffered humiliation, embarrassment, and shame.

STANDARD OF REVIEW

Rule 12(b)(6) requires the court to review only the pleadings to determine whether they state a claim upon which relief can be granted. In considering a motion to dismiss, the court assumes all facts alleged in the complaint are true, construes the complaint liberally in the light most favorable to the plaintiff, and should dismiss only if "it appears beyond a doubt that the plaintiff can prove no set of facts which would entitle the plaintiff to relief." Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994). "The issue is not whether a claimant will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974), overruled on other grounds by Davis v. Scherer, 468 U.S. 183, 191, 104 S. Ct. 3012, 3017, 82 L. Ed. 2d 139 (1984).

Defendants also assert that this action should be dismissed under Rule 12(b)(1) for lack of subject-matter jurisdiction. "Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the

federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (citations omitted). Because Wetherill brings this suit under 42 U.S.C. § 2000e, which grants federal courts jurisdiction over discrimination suits such as this one, the court concludes that the motion to dismiss is properly evaluated under Rule 12(b)(6), and not as one for lack of subject-matter jurisdiction. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (stating that there is subject-matter jurisdiction "if the right of the petitioners to recover under the complaint will be sustained" if there is a dispute as to the construction of federal law); see also Wood v. United States, 968 F.2d 738, 739 (8th Cir. 1992) (affirming dismissal of discrimination suit of National Guard airman for failure to state a claim under 12(b)(6)).

DISCUSSION

Defendants argue that Wetherill's claims should be dismissed because they are nonjusticiable under the doctrine established in Feres v. United States, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950). Defendants further contend that the court lacks subject matter jurisdiction because Title VII does not extend to military personnel. Finally, because Feres and its progeny bar civil suits by military members against the armed services, the state defendants argue that the Eleventh Amendment prohibits Wetherill's claims against them.

In response, Wetherill states that dismissal at this stage would be inappropriate, "because it remains to be seen whether or not the challenged conduct in this case involved 'an assessment of [Wetherill's] military qualifications.' " Docket 15, page 7 (citing Hupp v. United States, 144 F.3d 1144, 1148 (8th Cir. 1998)). Therefore, argues Wetherill, the court is unable to evaluate whether, under Eighth Circuit precedent, her Title VII claim is nonjusticiable. Discovery, she claims, will reveal that the challenged conduct was not based on consideration of military qualifications, rendering them reviewable by this court.

In Feres v. United States, the United States Supreme Court found that military service members could not bring negligence suits against the military. 340 U.S. at 146. Noting the unique relationship between the military and its members, the Court concluded that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Id. at 146. In a subsequent case, the Supreme Court reiterated the rationale of Feres: "Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment." Chappell v. Wallace, 462 U.S. 296, 299, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983). Courts have expanded the scope of the Feres rationale to shield the military from Bivens actions and liability under 42 U.S.C. § 1983. See, e.g., United States v. Stanley, 483 U.S. 669,

684, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987) (Bivens action); Watson v. Arkansas Nat'l Guard, 886 F.2d 1004, 1008 (8th Cir. 1989) (stating that the concern for "disruption of military discipline upon which Feres, Chappell, and Stanley are based applies equally when a court is asked to entertain an intra-military suit under § 1983"). Consequently, "[t]he permissible range of lawsuits by members of the service against their superior officers 'is at very least, narrowly circumscribed.' " Wood v. United States, 968 F.2d 738, 739 (8th Cir. 1992) (citation omitted).

The availability of Title VII of the Civil Rights Act of 1964 to military service members is similarly hindered. Title VII waived state's sovereign liability in the context of discrimination claims "affecting employees . . . in military departments." 42 U.S.C. § 2000e-16(a). As discussed further below, however, courts have generally interpreted this waiver as applying only to civilian employees of military departments, not to members of the armed forces. Johnson v. Alexander, 572 F.2d 1219, 1224 (8th Cir. 1978) (stating that "neither Title VII nor its standards are applicable to persons who enlist or apply for enlistment in any of the armed forces of the United States"); see also Brown v. United States, 227 F.3d 295, 298 n.3 (5th Cir. 2000) (surveying circuit courts adopting the same position); Bryant v. Dep't of Defense, Inspector General, 2008 WL 1699620, *3 (D. Minn. Apr. 9, 2008).

Wetherill is a member of the National Guard. National Guard military technicians, such as Wetherill, occupy a "dual status" position, which the Eighth Circuit has described as "hybrid." Wood v.

United States, 968 F.2d 738, 739 (8th Cir. 1992). While military technicians are described by statute as "civilian" positions, individuals holding those positions must also be members of the National Guard. Id.; 10 U.S.C. § 10216(a) (stating that "a military technician (dual status) is a Federal civilian employee who– . . . (B) is required . . . to maintain membership in the Selected Reserve"). With regard to the availability of Title VII to National Guard military technicians like Wetherill, the hybrid nature of the position "renders it susceptible to the doctrine restricting review of military decision-making," raising "justiciability concerns." Wood, 968 F.2d at 739.

In Hupp v. United States, 144 F.3d 1144 (8th Cir. 1998), the Eighth Circuit examined a claim of discrimination from a National Guard military technician that is similar to Wetherill's complaints here. In Hupp, the plaintiff conceded that the Feres doctrine would bar challenges to employment decisions that concerned the military technician's "military qualifications." Id. at 1147. Wetherill makes a similar concession. Docket 15, page 6 (admitting that dismissal may be appropriate if discovery were to reveal that the challenged conduct was based on an assessment of her military qualifications). With regard to challenges to decisions made about a military technician's civilian position, however, the Eighth Circuit in Hupp assumed without deciding that Title VII may apply, and went on to find that because the National Guard's conduct here "included consideration of both military and civilian qualifications," it was nonjusticiable under Feres. Hupp, 144 F.3d at 1148 (stating that the hiring issue involved an "assessment of military qualifications," implicating Feres); see also

Kearsley v. Brownlee, 2004 WL 256711, *2 (D. Minn. Feb. 10, 2004) (finding no jurisdiction when "selection and retention decisions" regarding military technicians were based "at least in part, upon a consideration of the ability to perform the ALSE tasks in a military capacity" and when his civilian and military duties were intertwined and implicated the "military's unique structure").

Some courts of appeal have similarly acknowledged that there may be liability under Title VII for some decisions that involve the purely civilian aspects of the position of National Guard military technician. Walch v. Adjutant General's Dep't of Texas, 533 F.3d 289, 299 (5th Cir. 2008) (stating that "claims that were solely a result of the civilian position would be justiciable"); Luckett v. Bure, 290 F.3d 493, 499 (2d Cir. 2002) (stating that Title VII applies to National Guard dual-status employees "except when the challenged conduct is integrally related to the military's unique structure"); Mier v. Owens, 57 F.3d 747 (9th Cir. 1995) (holding that "Title VII coverage . . . encompasses actions brought by Guard technicians except when the challenged conduct is integrally related to the military's unique structure"); Laurent v. Geren, 2008 WL 4587290, *3 (D. Virgin Is. Oct. 10, 2008) (denying motion to dismiss and finding that creating a "sexually hostile environment is not integrally related to the military's mission" and that discriminatory conduct may be actionable because it "affected Laurent in her capacity as a civilian"). Other circuits have found that military technicians are "irreducibly military in nature," and, therefore, civil suits are always nonjusticiable under Feres and its progeny. Fisher v. Peters, 249 F.3d 433, 443 (6th Cir.

2001) (Title VII); see also Wright v. Park, 5 F.3d 586, 588-89 (1st Cir. 1993) (Bivens action) (finding that National Guard technicians' positions are "military in nature" because they "are encompassed within a military organization and require the performance of work directly related to national defense").

Under any of these analyses used by various courts of appeal, Wetherill's Title VII claims are barred. The decisions of the National Guard and its employees with regard to Wetherill's MRD are undeniably military in nature. Under 10 U.S.C. § 14507, which discusses removal from military active status, Wetherill's Mandatory Removal Date (MRD) was set for July 31, 2007. The National Guard Bureau both extended her MRD and then retracted that extension. While her removal from active-status compromised her civilian employment at that time, the action taken by defendants was a military personnel management decision, because it only involved her military status and it was not solely related to her civilian employment. See 32 U.S.C. § 709(f)(1)(A) (stating that a military technician who is separated from the National Guard will also be separated from employment as a military technician); Williams, 533 F.3d at 368 (stating that although the military's actions had "a civilian component" in that the discharge made him ineligible for a civilian position, "the decision to discharge him . . . [was] a military personnel management decision which was integral to the military structure and which we will not second guess"); Overton v. New York State Division of Military and Naval Affairs, 373 F.3d 83, 96 (2d Cir. 2004) (dismissing Title VII claims because "[a]ny attempt to dissect and analyze the civilian

relationship between Overton and Fletcher, with its military dimensions, . . . would itself threaten to intrude into their military relationship," an area where courts are "ill-equipped to determine the impact upon discipline that . . . [such an] intrusion upon military authority might have") (citations omitted). The National Guard's actions regarding Wetherill's retirement from active military status after 30 years of active service, as discussed in 10 U.S.C. § 14507, is "integrally related to the military's unique structure" and therefore is nonjusticiable under Feres and its progeny. See Luckett, 290 F.3d at 499; see also Walch, 533 F.3d at 301; Mier, 57 F.3d at 749 (stating that "[g]uard technicians' challenges to discharge by the Guard and termination from technician employment are nonjusticiable because judicial review 'would seriously impede the military in performance of its vital duties'"). Wetherill's retaliation claim is also barred in light of the military component of her military technician status. See Brown, 227 F.3d 295 (5th Cir. 2000). Finally, to the extent that Wetherill seeks equitable remedies, the court's analysis is the same and such claims are similarly barred. Watson, 886 F.2d at 1008.

In her opposition to the motions to dismiss, Wetherill contends that the plain language of 10 U.S.C. § 10216(a), which describes military technicians as "civilian employees," combined with the language of Title VII, "unequivocally announces that dual status technicians are to be afforded the same substantive rights afforded any other federal civilian employee." Docket 15, page 10. Such an argument has been rejected by other courts. See Walch, 533 F.3d at 299 (stating that reference to technician's "civilian

status [was] an introduction to provisions primarily concerned with the annual requests to Congress for authorizing specific numbers of technician positions"); Williams v. Wynne, 533 F.3d 360, 367 (5th Cir. 2008) (stating that Title VII claims may be precluded by Feres "notwithstanding the statement in § 10216(a) that 'a military technician (dual status) is a Federal civilian employee'"); cf Jentoft v. United States, 450 F.3d 1342, 1348-49 (Fed. Cir. 2006) (finding that military technician brought a justiciable claim under the Equal Pay Act as a civilian employee under § 10216); but see Walch, 533 F.3d at 300 (declining to apply Jentoft to Title VII claims because it "would remove the Feres doctrine as a bar to any federal statutory claims brought by National Guard technicians" and such a "doctrinal revolution has not been noticed by other circuit courts"). This court similarly rejects the argument that the language of § 10216 alters the application of Feres to Title VII, because such a holding would ignore the significant case law to the contrary that discusses the limited availability of Title VII to dual-status military technicians such as Wetherill.

Wetherill argues that she should be given the benefits of discovery to make the case that defendants' conduct was not based on her military status, but was based in impermissible discrimination. Even if Wetherill could establish that defendants' conduct was based on discrimination and not on her military qualifications, it is the nature of the decisions made with regard to her mandatory removal date and work assignments, which decisions are of undeniable military character, which render the claim nonjusticiable under Feres. As the Fifth Circuit said,

> a court may not reconsider what a claimant's superiors did in the name of personnel management-demotions, determining performance level, reassignments to different jobs-because such decisions are integral to the military structure. Some of those decisions might on occasion be infected with the kinds of discrimination that Title VII seeks to correct, but in the military context the disruption of judicially examining each claim in each case has been held to undermine other important concerns.

Walch, 533 F.3d at 301.

For these reasons, the court concludes that Wetherill's complaints are nonjusticiable under the Feres doctrine, and that this court therefore lacks subject matter jurisdiction over her Title VII complaints. Pursuant to the Eighth Circuit's disposition in Wood, 968 F.2d at 740, and Hupp, 144 F.3d at 1148, Wetherill's complaint is dismissed without prejudice. Therefore, good cause appearing, it is hereby

ORDERED that the motion to dismiss filed by defendants Doohen, Johnson, and the South Dakota Army National Guard (Docket 9) is GRANTED without prejudice.

IT IS FURTHER ORDERED that the motion to dismiss filed by defendants Geren and the Army National Guard (Docket 11) is GRANTED without

prejudice.

Dated July 31, 2009.

BY THE COURT:
/s/ Karen E. Schreier
KAREN E. SCHREIER
CHIEF JUDGE

APPENDIX C

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-16(a)

All personnel actions affecting employees or applicants for employment . . . in military departments as defined in section 102 of title 5, United States Code . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)

(a) Employer practices. It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-3(a)

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title . . . , or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title . . . .

42 U.S.C. § 2000e-16(b)

(b) . . . . [T]he Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. . . .

. . . .

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions . . . .

42 U.S.C. § 2000e-16(c)

(c) Civil action by employee or applicant for

employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant. Within 90 days of receipt of notice of final action taken by a department, agency, or unit . . . [a federal] employee . . . , if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action . . . , in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant

42 U.S.C. § 2000e-16(d)

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions. The provisions of section 706(f) through (k) [42 USCS §§ 2000e-5(f)-(k)], as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

42 U.S.C. § 2000e-5(f)

(f) . . . . [If neither the Commission nor the Attorney General bring suit against a governmental agency or political subdivision named as a respondent in a EEO charge, then] "a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved . . . ."

29 C.F.R. 1614.407

A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief pursuant to a class complaint is authorized under title VII, the

ADEA and the Rehabilitation Act to file a civil action in an appropriate United States District Court:

(a) Within 90 days of receipt of the final action on an individual or class complaint if no appeal has been filed;

. . . .

32 U.S.C. § 709(b)

(b) Except as authorized in subsection (c), a person employed under subsection (a) [i.e., a National Guard technician] must meet each of the following requirements:

(1) Be a military technician (dual status) as defined in section 10216(a) of title 10.

(2) Be a member of the National Guard.

(3) Hold the military grade specified by the Secretary concerned for that position.

(4) While performing duties as a military technician (dual status), wear the uniform appropriate for the member's grade and component of the armed forces.

10 U.S.C. §10216(a)

(a) In general.

(1) For purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee who--

(A) is employed under section 3101 of title 5 or section 709(b) of title 32;

(B) is required as a condition of that employment to maintain membership in the Selected Reserve; and

(C) is assigned to a civilian position as a technician

in the organizing, administering, instructing, or training of the Selected Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.

(2) Military technicians (dual status) shall be authorized and accounted for as a separate category of civilian employees.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Nancy J. Wetherill,
Plaintiff,

v.

Pete R. Geren, Secretary of the Army; The Army National Guard; Steven R. Doohen, Brigadier General, in his official capacity as Adjutant General of the South Dakota National Guard; Theodore Johnson, Brigadier General, in his official capacity; and The South Dakota Army National Guard,
Defendants.

COMPLAINT

For her Complaint, Plaintiff Nancy J. Wetherill ("Plaintiff") alleges:

JURISDICTION AND VENUE

1. Jurisdiction is conferred on this Court pursuant to 42 U.S.C. § 2000e-5 and § 2000e-16.

2. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

3. Plaintiff filed discrimination charges with the National Guard Bureau ("NGB") on or about May 16, 2008, and received a Dismissal and Notice of Appeal Rights from the NGB on July 1, 2008, which is attached hereto as Exhibit A and incorporated herein by this reference.

PARTIES

4. Plaintiff, a Japanese-American female, commenced her military career with the Army National Guard in 1974, and she was commissioned on July 4, 1977. She was appointed Colonel on July 1, 1999.

5. At all times relevant to this action, Plaintiff was a dual-status military technician within the definition of 10 U.S.C. §10216.

6. Defendant Pete R. Geren is the Secretary of the Army, a military department contemplated by 42 U.S.C. §2000e-16.

7. Defendant Army National Guard is a component of the Army pursuant to 10 U.S.C. §10106.

8. Defendant Steven R. Doohen, Brigadier General, is Adjutant General of the South Dakota National Guard, including the South Dakota Army National Guard.

9. Defendant Theodore Johnson, Brigadier General, was, at all times relevant to this action,

Plaintiff's direct supervisor.

UNLAWFUL DISCRIMINATION IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT, AS AMENDED

10. Plaintiff began her career with the South Dakota National Guard in 1974. From 1982 until August of 2008, she was a resident of South Dakota and served in Rapid City, South Dakota, as a full-time military technician. From April 1, 2007, through July 31, 2008, Plaintiff was the Director of Operations, Military Technician, for the South Dakota Army Guard.

11. Pursuant to 10 U.S.C. § 14507, Plaintiff's Mandatory Removal Date ("MRD") was July 31, 2007. She would have been eligible for full annuity payments under the Civil Service Retirement System ("CSRS") on December 31, 2010.

12. On or about May 10, 2007, Major General Michael A. Gorman, then-Adjutant General of the South Dakota Army National Guard, requested the National Guard Bureau ("NGB") retain Plaintiff beyond her MRD to December 30, 2010, in order that she may qualify for a full annuity under the CSRS. On July 18, 2007, NGB approved this request.

13. On or about September 15, 2007, Major General Gorman retired and South Dakota Governor M. Michael Rounds selected Brigadier General Steven R. Doohen to serve as Adjutant General.

14. On or about January 23, 2008, Adjutant

General Doohen requested the NGB to revoke the MRD extension previously granted to Plaintiff and requested that Plaintiff's new retirement date be set at April 30, 2008.

15. On or about February 2, 2008, Brigadier General Theodore Johnson and Colonel Dennis Flanery notified Plaintiff that she would be terminated from her military technician position on April 30, 2008, for "force management" reasons.

16. Adjutant General Doohen subsequently stayed Plaintiff's termination date from April 30, 2008, to July 31, 2008.

17. In a memorandum dated February 5, 2008, the NGB approved Adjutant General Doohen's "request to revoke the retention beyond MRD to 30 December 2010 on COL Nancy J. Wetherill," holding that the "effective date of separation is 31 July 2008."

18. In February and March of 2008, Plaintiff protested this unorthodox turn of events, requesting that her MRD waiver be reinstated, and complaining that Doohen's actions were motivated by improper gender and/or racial discrimination. These requests were denied.

19. On or about May 8, 2008, Plaintiff was reassigned to another building and was given work that is intended to be performed by persons holding a rank lower than Colonel. Plaintiff was forced to work in an isolated building with no other occupants and was performing work that no Colonel would ever be required to perform.

20. No other technician in the South Dakota Army National Guard has ever been denied the opportunity to receive an unreduced annuity as a result of having an MRD waiver being denied, modified, or revoked.

21. Plaintiff is the only Asian-American female officer serving in the South Dakota Army National Guard.

22. Plaintiff is the only female in the South Dakota Army National Guard to have served at the 06 level in a non-special branch.

23. The reasons given for the revocation of Plaintiff's MRD waiver were pretextual in nature.

24. The decision to revoke Plaintiff's MRD waiver was based on discrimination against her because of her gender.

25. The decision to revoke Plaintiff's MRD waiver was based on discrimination against her because of her race and/or national origin.

26. The acts of moving Plaintiff to an isolated work station and forcing her to perform tasks for which she was severely over-qualified were acts taken in retaliation for Plaintiff's protesting the revocation of her MRD waiver and in retaliation for Plaintiff's complaining of unlawful discrimination, in violation of 42 U.S.C. § 2000e-3(a).

27. As a result of Defendant's discriminatory actions, Plaintiff is prevented from receiving an

unreduced annuity.

28. As a result of Defendant's discriminatory actions, Plaintiff is precluded from receiving future promotions and substantial pay increases.

29. As a result of Defendant's retaliatory actions, Plaintiff suffered humiliation, embarrassment, and shame.

WHEREFORE, Plaintiff prays for the following relief:

A. Restoration and reinstatement of her original NGB Waiver of MRD to December 30, 2010;

B. Restoration and reinstatement to a position equal in grade and stature to the position she held before the forced retirement on July 31, 2008;

C. Compensation for lost pay, back pay, and other damages as provided by law;

D. Attorney's fees and costs;

E. An injunction prohibiting Defendant from further engaging of acts of unlawful discrimination against Plaintiff; and

F. Any other relief the Court deems equitable and just.

Dated the 26th day of September, 2008.

BANGS, McCULLEN, BUTLER,

FOYE & SIMMONS, L.L.P.
By: _____
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DEPARTMENT OF THE ARMY AND THE AIR FORCE
NATIONAL GUARD BUREAU
1411 JEFFERSON DAVIS HIGHWAY
ARLINGTON VA 22202-3231

NGB-EO-CR (690-00) 24 June 2008

MEMORANDUM FOR State Equal Employment Manager, South Dakota Army National Guard, 2823 West Main Street, Rapid City, South Dakota 57702-8186

SUBJECT: Notice of Dismissal of Discrimination Complaint of Ms. Nancy J. Wetherill and Pete Garen, Secretary of the Army, NGB Case No. T-0895-SD-A-01-08-NG

Ref: (a) Formal Discrimination Complaint Form dated 16 May 2008 and Receipt Acknowledged on 27 May 2008

(b) National Guard Regulation (NGR), Army Regulation (AR), 690-600/NGR, Air Force (AF) 40-1614.

(c) 29 Code of Federal Regulations (CFR) § Part 1614.

1. Pursuant to the provision of NGR (AR) 690-600/NGR (AF) 40-1614, paragraph 4-10, the National Guard Bureau, Office of Equal Opportunity and Civil Rights (NGB-EO-CR) has reviewed the Notice of Dismissal of subject complaint and has determined

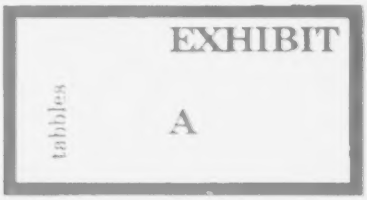
the dismissal was proper. However, the issues have been rewritten and separated from the list of evidence and/or background information included and attached to the formal complaint form.

2. The following issues have been dismissed with the cited reason for dismissal.

a. Complainant claims she is being discriminated against based on her gender (female) and national origin (Asian-American) when on 22 February 2008, she was informed that her Mandatory Retirement Date (MRD) had been readjusted from 31 March 2008 to 31 July 2008. This issue is dismissed in accordance with NGR (AR) 690-600/NGR (AF) 40-1614, paragraph 4-11 (a) (1) and 29 CFR 1614.103 (d) (1) and 107 (a) (1). These statutes state a claim of discrimination may be dismissed that fails to state a claim under §4.1614.103 or §1614.106 (a), and is not within the purview of the State National Guard or the NGB to remedy. This refers to a situation over which neither the State National Guard or the NGB has jurisdiction. Among claims falling in this category are actions that the National Guard is required to take in compliance with the Technician Personnel Act of 1968 (32 U.S.C. 709).

b. Complainant claims she is being discriminated against based on her gender (female) and national origin (Asian-American) when on 2 February 2008, she was informed that she will be terminated from her military technician position, effective 31 July 2008, for "force management" reasons. This issue is dismissed in accordance with NGR (AR) 690-600/NGR (AF) 40-1614 paragraph 4-11 (a) (1) and 29 CFR 1614.103 (d)

(1) and 107 (a) (1). These statutes state a claim of discrimination may be dismissed that fails to state a claim under §4 1614.103 or §1614.106 (a). Additionally, Title 32 U.S.C. 709 (b) (2) states persons employed as technicians must be a member of the National Guard. The statute further states a person



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who is employed as a military technician (dual status) who is separated from the National Guard or ceases to hold the military grade specified by the Secretary concerned for that position shall be promptly separated from military technician (dual status) employment by the adjutant general of the jurisdiction concerned.

3. If the complainant is dissatisfied with this decision, he/she has the following appeal rights.

APPEAL RIGHTS FOR NON-MIXED COMPLAINTS

1. An appeal may be filed with the Equal Employment Opportunity Commission within 30 calendar days of the date of receipt of this decision. The 30-day period for filing an appeal begins on the date of receipt of this decision. An appeal shall be deemed timely if it is delivered in person, transmitted by facsimile or postmarked before the expiration of the filing period or, in the absence of a legible postmark, the appeal is received by the Commission by mail within 5 days after the expiration of the filing period. The complainant will serve a copy of the Notice of Appeal/Petition, EEOC Form 573, to the agency [Chief of Complaints Management Division, National Guard Bureau, 1411 Jefferson Davis Highway, Suite 2400, Arlington, Virginia 22202] [and

furnish a copy to the Adjutant General California National Guard, 9800 S. Goethe Road, P.O. Box 269101, Sacramento, CA 95826-9101] at the same time it is filed with the Commission. In or attached to the appeal to the Commission, the complainant must certify the date and method by which service was made to the agency [Chief of Complaints Management Division for the National Guard Bureau].

2. The complainant may file a brief or statement in support of his/her appeal with the Office of Federal Operations. The brief or statement must be filed within 30 calendar days from the date the appeal is filed. The complainant will serve a copy of the brief or statement in support of his/her appeal to the agency [Chief of Complaints Management Division for the National Guard Bureau and to the Staff Judge Advocate at the addresses shown above] at the same time the brief or statement is filed with the Commission. The regulation providing for appeal rights is contained in Title 29 of the Code of Federal Regulations, a section of which is reproduced below:

Section 1614.401 Appeals to the Commission.

(a) A complainant may appeal an agency's final action or dismissal of a complaint.

(b) An agency may appeal as provided in Section 1614.110 (a).

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(c) A class agent or an agency may appeal an administrative judge's decision accepting or dismissing all or part of a class complaint; a class agent may appeal a final decision on a class complaint; a class member may appeal a final decision on a claim for individual relief under a class complaint; and a class member, a class agent or an agency may appeal a final decision on a petition pursuant to Section 1614.204 (g) (4).

(d) A grievant may appeal the final decision of the agency, the arbitrator or the Federal Labor Relations Authority (FLRA) on the grievance when an issue of employment discrimination was raised in a negotiated grievance procedure that permits such issues to be raised. A grievant may not appeal under this part, however, when the matter initially raised in the negotiated grievance procedure is still ongoing in that process, is in arbitration, is before the FLRA, is appealable to the MSPB [Merit Systems Protection Board] or if 5 U.S.C. 7121 (d) is inapplicable to the involved agency.

(e) A complainant, agent or individual class claimant may appeal to the Commission an agency's alleged noncompliance with a settlement agreement or final decision in accordance with Section 1614.504.

Section 1614.402 Time for Appeals to the

Commission.

(a) Appeals described in Section 1614.401(a) and (c) must be filed within 30 days of receipt of the dismissal, final action or decision. Appeals described in Section 1614.401(b) must be filed within 40 days of receipt of the hearing file and decision. Where a complainant has notified the Director, National Guard Bureau, Equal Opportunity and Civil Rights [Chief of Complaints Management Division, National Guard Bureau] of alleged noncompliance with a settlement agreement in accordance with Section 1614.504, the complainant may file an appeal 35 days after service of the allegations of noncompliance, but no later than 30 days after receipt of the agency's determination.

(b) If the complainant is represented by an attorney of record, then the 30-day time period provided in paragraph (a) of this section within which to appeal shall be calculated from the receipt of the required document by the attorney. In all other instances, the time within which to appeal shall be calculated from the receipt of the required document by the complainant.

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Section 1614.403 How to appeal.

(a) The complainant, agency, agent, grievant or individual class claimant (hereinafter appellant) must file an appeal with the Director, Office of Federal Operations, Equal Employment Opportunity Commission, at P.O. Box 19848, Washington, DC 20036, or by personal delivery or facsimile. The complainant should use EEOC Form 573, Notice of Appeal/Petition [copy enclosed], and should indicate what is being appealed.

(b) The appellant shall furnish a copy of the appeal to the opposing party [Chief of Complaints Management Division, National Guard Bureau and to the Staff Judge Advocate - addresses shown above] at the same time it is filed with the Commission. In or attached to the appeal to the Commission, the appellant must certify the date and method by which service was made on the opposing party [Chief of Complaints Management Division, National Guard Bureau].

(c) If an appellant does not file an appeal within the time limits of this subpart, the appeal shall be dismissed by the Commission as untimely.

(d) Any statement or brief on behalf of a complainant in support of the appeal must be

submitted to the Office of Federal Operations within 30 days of filing the notice of appeal. Any statement or brief on behalf of the agency in support of its appeal must be submitted to the Office of Federal Operations within 20 days of filing the notice of appeal. The Office of Federal Operations will accept statements or briefs in support of an appeal by facsimile transmittal, provided they are no more than 10 pages long.

(e) The agency must submit the complaint file to the Office of Federal Operations within 30 days of initial notification that the complainant has filed an appeal or within 30 days of submission of an appeal by the agency.

(f) Any statement or brief in opposition to an appeal must be submitted to the Commission and served on the opposing party within 30 days of receipt of the statement or brief supporting the appeal, or, if no statement or brief supporting the appeal is filed, within 60 days of receipt of the appeal. The Office of Federal Operations will accept statements or briefs in opposition to an appeal by facsimile provided they are no more than 10 pages long.

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Section 1614.407 Civil Action: Title VII, Age Discrimination in Employment Act and Rehabilitation Act

A complainant who has filed an individual complaint, an agent who has filed a class complaint or a claimant who has filed a claim for individual relief pursuant to a class complaint is authorized under Title VII, the ADEA [Age Discrimination in Employment Act] and the Rehabilitation Act to file a civil action in an appropriate United States District Court:

(a) Within 90 calendar days of receipt of the final action on an individual or class complaint if no appeal has been filed;

(b) After 180 days from the date of filing an individual or class complaint if an appeal has not been filed and final action has not been taken;

(c) Within 90 days of receipt of the Commission's final decision on an appeal; or

(d) After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission.

Section 1614.408 Civil Action: Equal Pay Act

A complainant is authorized under section 16(b) of the Fair Labor Standards Act (29 U.S.C. 216[b]) to file a civil action in a court of competent jurisdiction within two years or, if the violation is willful, three years of the date of the alleged violation of the Equal Pay Act regardless of whether he or she pursued any administrative complaint processing. Recovery of back wages is limited to two years prior to the dale of filing suit, or to three years if the violation is deemed willful; liquidated damages in an equal amount may also be awarded. The filing of a complaint or appeal under this part shall not toll the time for filing a civil action.

Section 1614.409 Effect of Filing a Civil Action.

Filing a civil action under § 1614.408 or §1614.409 shall terminate Commission processing of the appeal. If private suit is filed subsequent to the filing of an appeal, the parties are requested to notify the Commission in writing.

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If a civil action is filed and complainant does not have or is unable to obtain the services of a lawyer, the complainant may request the court to appoint a lawyer. In such circumstances as the court may deem just, the court may appoint a lawyer to represent the complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Any such request must be made within the above referenced 90-day time limit for filing suit and in such form and manner as the court may require.

You are further notified that if you file a civil action, you must name the appropriate Department or Agency head as the defendant and provide his or her official title. DO NOT NAME JUST THE AGENCY OR DEPARTMENT. Failure to name the head of the Department or Agency or to state her or her official title may result in the dismissal of the case. The appropriate agency is the Army National Guard. The head of the Army National Guard is the Honorable Pete R. Geren, Secretary of the Army.

DOCKET NUMBER

The docket number identified in the subject line of this memorandum should be used on all correspondence.

4. If you have any questions regarding this matter,

you may contact Ms. Gina Nesbitt at (703) 607-0769 or DSN 327-0769.
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Encl
EEOC Form 573

J. PAGE
Chief, Complaints
Management
National Guard Bureau

CF:
Ms. Nancy J. Wetherill, Complainant (w/encl)
The Adjutant General, SD (w/o encl)
The Staff Judge Advocate, SD (w/o encl)

NOTICE OF APPEAL/PETITION TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OFFICE OF FEDERAL OPERATIONS
P.O. Box 19848
Washington, DC 20036

Complainant Information: (Please Print or Type)

Complainant's name (Last, First M.I.):	
Home/mailing address:	
City, State, ZIP code:	
Daytime telephone # (with area code):	
E-mail address (if any):	

Attorney/Representative Information (if any):

Attorney name:	
Non-Attorney Representative name:	
Address:	
City, State, ZIP Code:	
Telephone number (if applicable):	
E-mail address (if any):	

General Information:

Name of the agency being charged with discrimination:	
Identify the Agency's	

complaint number: **Location of the duty station or local facility in which the complaint arose:**	
Has a final action been taken by the agency, an Arbitrator, FLRA, or MSPB on this complaint?	___ Yes; Date Received _____ ____ (Remember to attach a copy) ___ No ___ This appeal alleges a breach of settlement agreement
Has a complaint been filed on this same matter with the EEOC, another agency, or through any other administrative or collective bargaining procedures?	___ No ___ Yes (Indicate the agency or procedure, complaint/docket number, and attach a copy, if appropriate)
Has a civil action (lawsuit) been filed in connection with this complaint?	___ No ___ Yes **(attach a copy of the civil action filed)**

NOTICE: Please **attach a copy of the final decision or order** from which you are appealing. If a hearing was requested, please attach a copy of the agency's final order and a copy of the EEOC Administrative Judge's decision. Any comments or brief in support of this appeal MUST be filed with the EEOC **and** with the agency **within 30 days** of the date this appeal is filed. The date the appeal is filed is the date on which it is postmarked, hand delivered, or faxed to the EEOC at the address above.

Signature of complainant or complainant's representative:	
Date:	

EEOC Form 573 REV 1/01

PRIVACY ACT STATEMENT

(This form is covered by the Privacy Act of 1974, Public Law 93-597. Authority for requesting the personal data and the use thereof are given below.)

1. **FORM NUMBER/TITLE/DATE:** EEOC Form 573, Notice of Appeal/Petition, January 2001
2. **AUTHORITY:** 42 U.S.C.§ 2000e-16

3. **PRINCIPAL PURPOSE:** The purpose of this questionnaire is to solicit information to enable the Commission to properly and efficiently

adjudicate appeals filed by Federal employees, former Federal employees, and applicants for Federal employment.

4. **ROUTINE USES:** Information provided on this form will be used by Commission employees to determine: (a) the appropriate agency from which to request relevant files; (b) whether the appeal is timely; (c) whether the Commission has jurisdiction over the issue(s) raised in the appeal, and (d) generally, to assist the Commission in properly processing and deciding appeals. Decisions of the Commission are final administrative decisions, and, as such, are available to the public under the provisions of the Freedom of Information Act. Some information may also be used in depersonalized form as a data base for statistical purposes.

5. **WHETHER DISCLOSURE IS MANDATORY OR VOLUNTARY AND EFFECT ON INDIVIDUAL FOR NOT PROVIDING INFORMATION:** Since your appeal is a voluntary action, you are not required to provide any personal information in connection with it. However, failure to supply the Commission with the requested information could hinder timely processing of your case, or even result in the rejection or dismissal of your appeal.

Send your appeal to:

The Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, D.C. 20036

Figure 4-17 Notice of Appeal/Petition to Equal Employment Opportunity Commission

RAPID CITY MAIN POST OFFICE
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Sales Receipt

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Mail Pickup Date:		07/01/2000	09:51 AM
Total:			$0.00

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